

1 WRITTEN DECISION - NOT FOR PUBLICATION

FILED	FILED
ENTERED	ENTERED
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RECEIVED	RECEIVED
JUN 16 2006	
CLERK, U.S. BANKRUPTCY COURT	
SOUTHERN DISTRICT OF CALIFORNIA	
BY <u>22</u>	DEPUTY

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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re:) BANKRUPTCY CASE NO. 96-12037-H7
11)
11 Vern D. Blanchard d/b/a) ORDER DENYING MOTION
12 American Multi-Systems,) FOR STAY OF ORDER
12) PENDING APPEAL
13 Debtor.)
14

15 On January 12, 2006, the Chapter 7 Trustee, (the "trustee")
16 filed his "Notice of Intended Action re: Settlement of Claims in
17 Adversary 99-90357" (the "settlement"). The trustee seeks to
18 settle all claims with Randee Erickson, individually and on behalf
19 of her minor children. As part of the settlement, the trustee
20 seeks to vacate that portion of the default judgment entered
21 against Randee Erickson, and others, in Adversary No. 99-90357,
22 that finds the real property located at 557 Steffy Road and 539
23 Steffy Road, Ramona, California (the "Steffy Road Properties") is
24 property of the estate. In other words, the Steffy Road Properties
25 will no longer be property of this estate and will not be able to
26 be used to satisfy creditor claims.

27 Scott A. McMillan ("McMillan"), the trustee's special counsel,
28 opposed the Steffy Road Properties being released from this estate

1 because his appeal of this Court's prior ruling with respect to his
2 attorney fees is still pending. In McMillan's opposition, he
3 requests a stay pending appeal.¹

4 Stays pending an appeal from Bankruptcy Court should only be
5 granted in limited circumstances. Licensing By Paolo, Inc. v.
6 Sinatra (In re Gucci), 105 F.3d 837, 840 (2d Cir. 1997). Under
7 Federal Rule Bankruptcy Procedure 8005, a party moving for
8 discretionary stay pending appeal of order of bankruptcy court must
9 prove 1) that appellant is likely to succeed on merits of appeal;
10 2) that appellant will suffer irreparable injury if stay is denied;
11 3) that no substantial harm will come to appellee if stay is
12 granted; and 4) that stay will do no harm to public interest. The
13 appellant moving for discretionary stay pending appeal of order
14 bears the burden of establishing each of the four prerequisites for
15 such relief, and his failure to satisfy even one prong of standard
16 for granting such a stay dooms motion. Ohanian v. Irwin (In re
17 Irwin), 338 B.R. 839, 843 (E.D. Cal. 2006) (citations omitted).

18 The Court believes that McMillan's motion for a stay pending
19 appeal does not meet these standards.

20 *Likelihood of Success on the Merits*

21 McMillan argues that his fee determination should be subject
22 to 11 U.S.C. section 328, particularly in light of the fact that
23 the order appointing him special counsel provided that his fee
24 would be subject to that statute. He further argues that a fee
25 award that divides the assets paid out by the estate in the ratio
26 of two-thirds to creditor and administrative claims and one-third

27
28 ¹ Although McMillan objected to the settlement on other grounds, those
grounds do not implicate a stay pending appeal

1 to his fees is inconsistent with a Court-approved agreement that he
2 would be paid one-half of any recovery.

3 The Court finds that McMillan has not shown a likelihood of
4 success on appeal of his fee award. As pointed out in this Court's
5 memorandum decision, the trustee's ex parte employment application
6 was silent with respect to 11 U.S.C. 328 and the order authorizing
7 the trustee's employment of McMillan states that his compensation
8 is "subject to court approval after due notice and a hearing, and
9 subject to the provisions of Bankruptcy Code sections 328 and
10 330,...." McMillan has failed to show any errors in this Court's
11 prior ruling through argument, case law, or evidence.

12 *Irreparable Harm to Moving Party McMillan*

13 McMillan contends that his interests will be irreversibly
14 compromised if the property is abandoned at this time. If McMillan
15 is successful on his appeal, there will be no assets to pay what is
16 due to him. According to McMillan, this is precisely the sort of
17 irreparable harm that requires the issuance of a stay. This Court
18 will assume that this factor weighs in favor of McMillan.

19 *Substantial Harm to Other Parties*

20 McMillan argues that there will be no harm to other parties.
21 Specifically, the creditors will not be harmed because there are
22 currently funds to pay them in full with interest. Further, the
23 trustee will continue to hold the property in trust for the debtor
24 while McMillan's appeal is pending, rather than give the property
25 back to third parties.

26 However, the trustee has determined that with respect to the
27 Steffy Road Properties, they should not be considered part of this
28 estate as indicated in the default judgment. The trustee has set

1 forth his reasons in his reply to McMillan's opposition to the
2 proposed settlement, [Docket #253], which will not be repeated
3 here. The settlement should not be compromised when the trustee
4 has exercised his business judgment to settle the claims of Randee
5 Erickson. The Bankruptcy Court generally gives deference to a
6 trustee's business judgment. In re Mickey Thompson Enter. Grp.,
7 Inc., 292 B.R. 415, 420 (B.A.P. 9th Cir. 2003).

8 The Court finds that this factor weighs in favor of the estate
9 and the trustee. The trustee seeks to avoid any further litigation
10 regarding the true ownership of the Steffy Road Properties and
11 liability for defective service concerning Randee Erickson. Even
12 though this estate is presently solvent, interest continues to
13 accrue on creditor claims as do administrative expenses for the
14 trustee's counsel which may impact any return to the debtor.
15 Further, it is the trustee's duty to administer the estate and
16 close it as expeditiously as is compatible with the best interests
17 of parties in interest. The settlement brings the trustee one step
18 closer to fulfilling this duty under 11 U.S.C. section 704(a)(1).
19 Thus, the Court cannot find any compelling reason to hold the
20 Steffy Road Properties hostage while McMillan goes through a
21 lengthy appeal.²

22 ///

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25 ² On January 11, 2006, the trustee, also filed his Notice of Intended Action
26 re: Abandonment of Property (the "abandonment"). The trustee seeks to abandon
27 135,200 shares of GameTech stock and the Steffy Road Properties. At the June 14,
28 2006, hearing, the Court found that the trustee's notice of intended action to
abandon the Steffy Road Properties was moot since the Court approved the settlement
with Randee Erickson. The trustee also had a motion to turnover the 135,200 shares
of GameTech stock which the Court granted. The Court continued the hearing on the
trustee's abandonment of the stock.

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6 The Court finds that the public interest is not implicated in
7 this matter.

9 McMillan has failed to meet the standards for a Stay Pending
0 Appeal so his request is DENIED.

3 Dated: June 16, 2005

3 | S:\McMillan Stay Order.wpd

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991**

In re: Bankruptcy Case No. 96-12037-H7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER DENYING MOTION FOR STAY OF ORDER PENDING APPEAL

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

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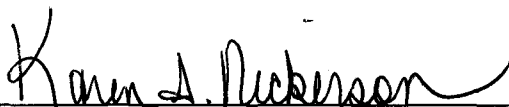
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Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on June 16, 2006.



Karen Nickerson (Deputy Clerk)
Judicial Assistant to the Honorable John J. Hargrove